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No. 88-1052

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHNS-MANVILLE CORPORATION AND JOHNS-MANVILLE SALES CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 1500, "[t]he United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff * * * has pending in any other court any suit or process against the United States * * *." The question presented is:

Whether 28 U.S.C. 1500 bars the Claims Court's jurisdiction over petitioners' actions under the Tucker Act seeking monetary damages from the United States, where petitioners have previously filed lawsuits in the district courts that also seek monetary damages from the United States and that are based on the same nucleus of operative facts as the actions filed in the Claims Court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 855 F.2d 1556. The opinion of the United States Claims Court (Pet. App. 33a-74a) is reported at 12 Cl. Ct. 197.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1988. On November 12, 1988, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 22, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, Johns-Manville Corporation and Johns-Manville Sales Corporation, manufactured and sold asbestos-containing products. Thousands of workers who have been exposed to those products have successfully sued or are suing petitioners for substantial amounts of damages. The United States employed many of those workers at federally owned and operated shipyards (public shipyards) that used petitioners' products. Many other such plaintiffs were employed by privately owned and operated shipyards that built or repaired ships for the United States with petitioners' products. Petitioners have attempted, in both the district courts and the Claims Court, to obtain reimbursement from the United States for payments made to successful asbestos plaintiffs. This case involves the application of 28 U.S.C. 1500[1] to those efforts.

1. a. In December 1981, petitioners filed an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, against the United States in the United States District Court for the Northern District of California. That action sought indemnification, including litigation expenses, for a $45,500 tort settlement made to John C. Robinson, a former public shipyard worker. *Johns-Manville Sales Corp.* v. *United States,* No. C-81-4561-RFP (N.D. Cal.) (*Robinson*) (C.A. App.

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[1] Title 28, United States Code, Section 1500 provides:

> The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

990-999).[2] Petitioners alleged that the United States negligently adopted military specifications requiring the use of petitioners' asbestos-containing products, negligently failed to protect and warn workers exposed to such products, breached implied warranties to petitioners in promulgating plans, specifications, standards, and regulations requiring the use of asbestos, and breached implied warranties to indemnify petitioners for any damages incurred from paying legal claims of workers exposed to asbestos (Pet. App. 42a-43a; C.A. App. 993-997).[3] Following protracted preliminary litigation, petitioners' second amended *Robinson* complaint, which essentially mirrors the first complaint, remains pending before the district court.[4]

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[2] C.A. App. refers to the Joint Appendix filed with petitioners' brief in the court of appeals.

In 1977, Robinson sued petitioners in California state court for injuries resulting from exposure to petitioners' asbestos-containing products during his work at two public shipyards in California for the period 1965 to 1976. In October 1981, petitioners settled the lawsuit by paying Robinson a total of $45,500. C.A. App. 992-993.

[3] Petitioners also asserted that the United States had violated the Fifth Amendment by imposing upon them, without just compensation, the costs of continued use of asbestos-containing products, costs that included those associated with the diseases contracted by workers such as Robinson (C.A. App. 998-999).

[4] In January 1983, the district court dismissed petitioners' original complaint (excepting the Fifth Amendment count) for failure to file an administrative claim under 28 U.S.C. 2675 (Pet. App. 42a; C.A. App. 559-573). In November 1983, petitioners filed an amended complaint, which, among other things, elaborated petitioners' original complaint and added counts based on the Public Vessels Act, 46 U.S.C. 781 *et seq.*, and the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.* (Pet. App. 42a; C.A. App. 1000-1025). In January 1984, the district court granted petitioners' motion to file the amended complaint (Pet. App. 42a; C.A. App. 574-585). The government

b. In 1981 and 1982, a number of private shipyard workers at the Newport News Shipyard filed separate lawsuits against petitioners in the United States District Court for the Eastern District of Virginia. Petitioners then filed 59 third-party actions (*Newport News* cases) against the United States under the FTCA and the Tucker Act, 28 U.S.C. 1346(a) and 1491. Those actions sought relief in contribution or indemnification against the United States for any payments petitioners ultimately might make to those private shipyard plaintiffs, and relied on theories similar to those relied on in the *Robinson* case, *i.e.*, that

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thereafter moved to dismiss that amended complaint. Petitioners then moved to withdraw their Fifth Amendment and maritime law counts, and in December 1984, the district court accordingly dismissed them. Pet. App. 43a; C.A. App. 586. In August 1985, the district court denied the government's motion to dismiss the remaining FTCA counts, but required petitioners to plead proximate causation more specifically, *i.e.*, "to allege explicitly facts to show how the asbestos [petitioners were] forced to supply to the government caused harm to Robinson." *Johns-Manville Sales Corp.* v. *United States*, 622 F. Supp. 443, 454 (N.D. Cal. 1985).

Petitioners complied by filing a second amended complaint in October 1985, which recast the initial action under the FTCA in terms of an alleged "special relationship" between petitioners and the United States during World War II regarding the manufacture and sale of asbestos-containing products (Pet. App. 43a; C.A. App. 1026-1063). The United States renewed its motion to dismiss and, in the alternative, sought certification for interlocutory appeal. In March 1987, the district court vacated submission of the government's motion pending the Ninth Circuit's resolution of a potentially dispositive case, *Lopez* v. *A.C. & S., Inc.*, No. 86-3905. C.A. App. 1077-1078. In August 1987, *Lopez* was transferred from the Ninth Circuit to the Federal Circuit and docketed as *Lopez* v. *Raymark Industries, Inc.*, No. 87-1543. The Federal Circuit issued its decision on September 28, 1988. *Lopez* v. *Raymark Industries, Inc.*, 858 F.2d 712 (Fed. Cir. 1988), reh'g denied, No. 87-1543 (Nov. 21, 1988). To date, the district court has not yet considered petitioners' *Robinson* complaint in light of the Federal Circuit's *Lopez* decision.

the United States "breach[ed] warranties of safe use, merchantability, and fitness for a particular purpose and * * * breach[ed] [a] duty to maintain a safe work place and to enforce health standards" (Pet. App. 5a). Again, those actions remain pending before the district court. Pet. App. 5a, 43a-44a; Pet. C.A. Br. 8.[5]

2. After filing the *Robinson* and *Newport News* complaints, petitioners brought three related actions against the United States in the United States Claims Court. In each case, considered as "test cases" by both the court and the parties (Pet. App. 62a), petitioners sought indemnification from the United States, under the Tucker Act and the Fifth Amendment, for more than $35 million in tort payments made to workers at public and private shipyards. In the first action, *Johns-Manville Corp.* v. *United States,* No. 465-83C (Ct. Cl. filed July 19, 1983) (*World War II* case), petitioners sought indemnification for payments made to shipyard workers exposed to asbestos during World War II. That complaint relied on several theories of relief: "(1) breach of an implied warranty of specifications, (2) breach of a duty to reveal superior knowledge, (3) reformation of the contract due to mutual

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[5] In August 1982, petitioners filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York. As a result, the underlying private shipyard plaintiffs' lawsuits in the Eastern District of Virginia, together with petitioners' third-party actions against the United States, were stayed pending reorganization. C.A. App. 622-626.

In October 1982, petitioners also filed an indemnification action against the United States in the United States District Court for the Western District of Washington. *Johns-Manville* v. *United States,* No. C83-798T. That action, which relied on theories similar to those asserted in the *Robinson* case, was dismissed in September 1984 for lack of prosecution. Pet. App. 5a n.4, 44a.

mistake of material facts, and (4) equitable adjustment" (Pet. App. 3a (footnote omitted); see C.A. App. 636-809).[6]

In the second action, *Johns-Manville Corp.* v. *United States,* No. 688-83C (Cl. Ct. filed Nov. 16, 1983), petitioners, raising the theories alleged in the *World War II* case, sought indemnification for payments made to certain shipyard workers exposed to asbestos after 1963 (Pet. App. 3a-4a; C.A. App. 811-840). Finally, in the third action, *Johns-Manville Corp.* v. *United States,* No. 1-84C (Cl. Ct. filed Jan. 3, 1984), petitioners, again raising the previously alleged legal theories, sought indemnification for payments made to certain shipyard workers exposed to asbestos from the World War II era through the post-1963 period (Pet. App. 4a; C.A. App. 926-962).[7]

3. Trial on petitioners' *World War II* case was scheduled for late April 1987. In January 1987, the Claims Court issued an order requiring the United States to "file forthwith a statement of its position or, if appropriate, a motion" regarding the applicability of 28 U.S.C. 1500 to

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[6] Petitioners had raised six other legal theories. They later abandoned one of those theories and the Claims Court dismissed the other five (Pet. App. 3a n.2, 44a-45a).

[7] After petitioners' Claims Court actions were filed, they initiated two additional actions under the FTCA against the United States in the United States District Court for the District of Colorado. In *Johns-Manville Corp.* v. *United States,* No. 84-C-893 (D. Colo. filed Apr. 24, 1984), petitioners sought recovery of damages incurred in a suit filed by Hessuph W. Sexton, a shipyard worker who alleged exposure to asbestos-containing products from 1944 to 1975. In *Johns-Manville Corp.* v. *United States,* No. 84-C-894 (D. Colo. filed Apr. 24, 1984), petitioners sought recovery of damages incurred in a suit filed by Philsun Owen, a shipyard worker who alleged exposure from 1941 to 1945 and 1951 to 1959. Those actions, which mirrored the complaint in the *Robinson* case, were later transferred to the Central District of California. Pet. App. 46a; C.A. App. 12-13 & n.4.

petitioners' pending actions (C.A. App. 42). The United States responded by moving to dismiss petitioners' three Claims Court actions for lack of jurisdiction under Section 1500 because petitioners' similar lawsuits were pending before the district courts (C.A. App. 43-79).[8]

4. The Claims Court, in an extensive opinion (Pet. App. 33a-74a), concluded that Section 1500 barred its jurisdiction over petitioners' actions because their previously filed lawsuits under the Federal Tort Claims Act, which also sought monetary damages from the United States, were pending before the district courts and were based on the same operative facts as the actions filed in the Claims Court. Rather than immediately dismissing those actions, however, the Claims Court gave petitioners 60 days "to start the process or obtain dismissal of the [*Robinson*] case and its third-party [*Newport News*] cases" in order for petitioners to proceed (Pet. App. 64a).

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[8] Six other sellers and manufacturers of asbestos-containing products had also filed actions in the Claims Court against the United States, and all of these actions were consolidated with petitioners' lawsuits for purposes of the Section 1500 motion. See *Keene Corp.* v. *United States*, No. 579-79C; *Eagle-Picher Industries, Inc.* v. *United States*, No. 170-83C; *GAF Corp.* v. *United States*, No. 287-83C; *UNR Industries, Inc.* v. *United States*, No. 16-84C; *Fibreboard Corp.* v. *United States*, No. 514-84C; *H.K. Porter Co.* v. *United States*, No. 515-85C. Those plaintiffs also had similar actions against the United States pending in district courts. Consequently, the United States moved to dismiss those plaintiffs' Claims Court actions under Section 1500. The Claims Court, however, chose to defer ruling on that aspect of the government's motion until receiving additional briefing, and, by an order entered in February 1987, limited its consideration of that motion to petitioners' three Claims Court actions. Pet. App. 35a & n.1.

On two separate occasions earlier in the related Claims Court asbestos litigation, the United States had unsuccessfully raised the Section 1500 jurisdictional bar in *Keene Corp., supra*, and in *Eagle-Picher Industries, Inc., supra*. See Pet. App. 36a-41a; C.A. App. 74-77.

a. The Claims Court detailed the similarities among petitioners' various actions pending against the United States in the district courts and the Claims Court (Pet. App. 42a-49a). Petitioners contended, nevertheless, that the statute does not bar Claims Court jurisdiction where the pending district court actions pleaded different theories of relief (tort versus contract), and could not have been brought in the Claims Court. Following established precedent, the Claims Court rejected that argument, explaining that "a suit in tort or contract can be the same claim or cause of action irrespective of the theory of relief urged in contract or tort, as long as it arises with respect to the same operative facts and asks for monetary relief" (Pet. App. 55a).[9]

b. Applying that standard to petitioners' actions, the Claims Court rejected petitioners' argument that Section 1500 should not apply where their Claims Court actions sought no relief for the specific tort payments at issue in the *Robinson* and *Newport News* cases. It stated (Pet. App. 62a):

> What [petitioners] seek[] to obtain in the *Robinson* case is, of course, a victory, but more importantly, a basis to collaterally estop the Government on the operative facts in subsequent litigation. The Claims Court cases are test cases. * * * By culling the [*Robinson*] case out of the Claims Court litigation, [petitioners] seek[] an opportunity to try as a tort the same

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[9] See, *e.g.*, *Corona Coal Co.* v. *United States*, 263 U.S. 537, 539 (1924); *Dwyer* v. *United States*, 7 Cl. Ct. 565, 568-569 (1985); *Los Angeles Shipbuilding & Drydock Corp.* v. *United States*, 152 F. Supp. 236, 238 (Ct. Cl. 1957); *National Cored Forgings Co.* v. *United States*, 132 F. Supp. 454, 459 (Ct. Cl. 1955); *British American Tobacco Co.* v. *United States*, 89 Ct. Cl. 438, 440 (1939) (per curiam), cert. denied, 310 U.S. 627 (1940).

> operative facts that are before the Claims Court in at least Nos. 465-83C (over 300 claims) and 688-83C (over 1,200 claims).

The court found that petitioners' Claims Court actions and the *Robinson* case were based on the same operative facts and sought monetary damages for the government's conduct (Pet. App. 58a-63a). The court similarly found that petitioners' Claims Court actions and the *Newport News* cases "plead[ed] the same operative facts underlying both the Government's specifications and knowledge of shipyard conditions and the Government's alleged duties to exercise care, supervise, and warn concerning the use of asbestos-containing products in shipyards" (*id.* at 63a (footnote omitted)).

c. The Claims Court accordingly held that Section 1500 barred its jurisdiction over petitioners' actions. As the court explained, "[i]f section 1500 could not reach this situation, the result would be that in any multiple-claimant situation, the Government would always be put to duplicate defense in the Claims Court and in other courts. If section 1500 has any utility, it should be to force election between this court and others for massive litigation like the instant asbestos cases that can only be handled on a test-case basis" (Pet. App. 62a-63a).[10]

5. Under 28 U.S.C. 1292(d)(2), the Claims Court certified its interlocutory decision for immediate appeal and also ordered that any interlocutory appeal would not interfere with the scheduled trial in the *World War II* case (No. 465-83C) (Pet. App. 74a). Rather than seeking dismissal of the *Robinson* and *Newport News* cases, as suggested by the Claims Court, petitioners promptly sought

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[10] The court also concluded (Pet. App. 65a-72a) that petitioners' district court actions filed after their Claims Court actions (see note 7, *supra*) did not trigger the jurisdictional bar of Section 1500.

permission to take an interlocutory appeal. On May 6, 1987, the court of appeals granted that request and directed the Claims Court not to dismiss petitioners' actions "pending resolution of the instant appeal" (Pet. App. 78a).[11] As a result, while the interlocutory appeal remained pending before the court of appeals, the Claims Court proceeded to trial in petitioners' *World War II* case (No. 465-83C). After a six-week trial, the court entered a nearly 100-page order and opinion dismissing petitioners' claims on the merits. *Johns-Manville Corp.* v. *United States*, 13 Cl. Ct. 72 (1987).

6. The court of appeals, by a vote of four to one, affirmed the Claims Court's ruling that it lacked jurisdiction (Pet. App. 1a-32a). It concluded that "[c]laims are the same where they arise from the same operative facts even if the operative facts support different legal theories which cannot all be brought in one court" (*id.* at 24a), and, accordingly, held that, under Section 1500, petitioners' previously filed *Robinson* case barred "Claims Court jurisdiction * * * over case Nos. 465-83C, 688-83C, and 1-84C" (Pet. App. 25a).[12]

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[11] The United States had also sought permission to take an interlocutory appeal from the Claims Court's holding that petitioners' later filed district court actions did not trigger Section 1500's jurisdictional bar over their Claims Court actions. The court of appeals granted that request. Pet. App. 78a. One month later, however, the court of appeals granted the government's unopposed motion to withdraw its petition for permission to appeal (*id.* at 80a).

[12] In light of the government's withdrawal of its petition for interlocutory review (see note 11, *supra*), the court of appeals did not address the issue whether petitioners' later filed district court actions triggered Section 1500's jurisdictional bar over their Claims Court actions (Pet. App. 4a n.3).

Petitioners had also appealed from the Claims Court's decision on the merits in the *World War II* case. In light of its disposition of the

a. Initially, the court of appeals recognized that "[t]his is a case of statutory construction" that required an interpretation of the phrase "any claim for or in respect to which the plaintiff * * * has pending * * *" (Pet. App. 6a (internal quotation marks omitted)). The court noted that Section 1500 itself did not define that phrase and that the word "claim" (or "cause of action") has "no one meaning in the law" (Pet. App. 8a). Consequently, the court considered the statute's legislative history and prior precedent construing that provision.

Surveying the legislative history (Pet. App. 8a-12a), the court found that "the intent of Congress was not to define 'claims' to mean legal theories" (*id.* at 12a). This was so because "[s]uch a definition would have rendered the section ineffective since the cotton claims towards which the section was originally aimed could not have been brought on the same theory in 1868 in both the Court of Claims and the district courts" (*ibid.* (footnote omitted)).[13] Thus,

jurisdictional issue on interlocutory appeal, the court of appeals, in a separate opinion, vacated the Claims Court's decision without reaching the merits. *Johns-Manville Corp.* v. *United States*, 855 F.2d 1571 (Fed. Cir. 1988) (*per curiam*).

[13] Senator Edmunds, the author of Section 1500, as originally adopted in the Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77, explained the statute's purpose:

> The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.

81 Cong. Globe, 40th Cong., 2d Sess. 2769 (1868).

the very events that triggered the legislation involved cases in which different legal theories were being asserted in separate actions arising out of the same factual controversy, and in which no one court had jurisdiction to entertain all those theories.

Turning to governing precedent, the court noted that the "purpose of section 1500 is to prohibit the filing and prosecution of the same claims against the United States in two courts at the same time" (Pet. App. 12a), and that the Court of Claims has construed the statute with that purpose in mind by comparing claims pending in two courts by their operative facts, not by their underlying legal theories (*id.* at 12a-14a).[14] The court of appeals accordingly read the term "claim" in Section 1500 "to be defined by the operative facts alleged, not the legal theories raised" (*id.* at 14a).

b. Applying that standard to petitioners' actions pending before the Claims Court and the district courts, the court of appeals concluded that the "operative facts which support the several legal theories raised are * * * the same" (Pet. App. 15a). The complaints in both the *Robinson* district court case and the *World War II* Claims Court case raised ten substantially similar material allegations, including allegations that "the specifications of the United States required asbestos in the insulation products," "the United States controlled the shipyard working conditions," "the United States implicitly agreed not to hold [petitioners] liable for damages where the products were made according to the specifications," "the United States had a duty to disclose its knowledge of the shipyard

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[14] *E.g., Los Angeles Shipbuilding & Drydock Corp.* v. *United States,* 152 F. Supp. 236, 237-238 (Ct. Cl. 1957); *British American Tobacco Co.* v. *United States,* 89 Ct. Cl. 438, 440 (1939) (per curiam), cert. denied, 310 U.S. 627 (1940).

working conditions," and "[petitioners are] not liable for the acts or omissions of the United States" (*ibid.*). Furthermore, the court of appeals found that "all the complaints, i.e., the [*Robinson*] case, the third-party complaints [*Newport News* cases], and all the Claims Court cases seek recovery for costs and expenses incurred and other damages connected to suits brought by shipyard workers against [petitioners], alleging injury from exposure to asbestos" (*ibid.*).[15]

c. The court of appeals also disagreed with petitioners' contention that Section 1500 should not apply where "the plaintiff cannot elect to bring all its theories of recovery in one court" (Pet. App. 17a). As noted above, the statute's legislative history and governing case law confirm that it "was enacted for the benefit of the government and was intended to force an election where both forums could grant the same relief, arising from the same operative facts" (*id.* at 18a (citing *Wessel, Duval & Co.* v. *United States*, 124 F. Supp. 636, 638 (Ct. Cl. 1954) (rejecting same argument)).[16]

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[15] The court of appeals also rejected petitioners' argument that Section 1500 should not apply where the pending cases covered different periods of time. Although noting that Robinson himself worked in the shipyard after 1963, the court also recognized that a significant part of the *Robinson* case alleged exposure to asbestos purchased and installed in the World War II era—the period covered by the first Claims Court action. In other words, that distinction did not matter for purposes of Section 1500 where "[i]n both cases [petitioners] base[] legal theories of recovery" on the same principal factual allegations regarding the government's safety standards, enforcement duties, and breaches of duties to petitioners themselves (Pet. App. 16a).

[16] Finally, the court of appeals dismissed petitioners' argument that the *Robinson* and *Newport News* cases, which had been stayed by the respective district courts, were not "pending" for purposes of Section

ARGUMENT

The decision of the court of appeals is a correct application of the statute and does not conflict with any decision of this Court. Accordingly, review by this Court is not warranted.

1. Petitioners principally contend (Pet. 11-15) that the court of appeals' decision simply misapplied Section 1500 beyond the limited purpose intended by Congress. But as the legislative history and court decisions interpreting the statute show, the purpose of Congress in enacting this provision was a broad one, and the decision below is fully consistent with that purpose.

As both the court of appeals and the Claims Court recognized (Pet. App. 8a-11a, 49a), the statute arose out of Congress's attempt to resolve "cotton claims," *i.e.*, attempts by putative owners of cotton confiscated by the Department of the Treasury during the Civil War era to recover that property or its value. Those claimants brought suit against the Secretary of the Treasury or his agents in various courts, "presumably on a theory of con-

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1500. The Court of Claims had specifically rejected that point in *National Cored Forgings Co.* v. *United States*, 132 F. Supp. 454, 457 (Ct. Cl. 1955). The court of appeals therefore adhered to the "plain meaning" of the word "pending," a term that obviously included cases which have been filed but stayed. Pet. App. 24a. Petitioners do not challenge that aspect of the court of appeals' decision here.

Judge Nichols dissented (Pet. App. 26a-31a). He concluded that "because of the ambiguity inherent in the word 'claims,' claims provable by different facts, and characterized respectively as tort and contract claims, would have been treated by the old Court of Claims as different claims if a claimant could not sue on both theories in any one court" (*id.* at 31a). He thus criticized the majority's decision as "a departure from precedent and an unseemly swing to the policy of erecting roadblocks against claimants seeking to assert a government liability, though such blocks would not exist in the case of a suit against a private company" (*ibid.*).

version" (Schwartz, *Section 1500 of the Judicial Code and Duplicative Suits Against the Government and Its Agents,* 55 Geo. L.J. 573, 577 (1967)). Having failed to recover in those courts, claimants then tried again by suing the United States directly in the Court of Claims under the Captured and Abandoned Property Act of 1863, ch. 120, § 3, 12 Stat. 820. Congress, by enacting the predecessor to Section 1500, sought to correct that vice of pursuing essentially the same action in two forums—on a tort theory in the district court and under an applicable Act of Congress in the Court of Claims. As Senator Edmunds explained, "[t]he object [of the provision] is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts" (81 Cong. Globe, 40th Cong., 2d Sess. 2769 (1868)).

Thus, contrary to petitioners' assertion, Congress intended more than the mere adoption of what may have been contemporary notions of res judicata, which generally tied notions of "claim preclusion" to a single theory of recovery.[17] Rather, the available legislative history, taken in context, shows that Congress specifically intended to force plaintiffs to select one forum in which to litigate their controversy with the government, regardless of the differing theories of recovery available in the district courts as opposed to the Court of Claims. In order to deal with the problems presented in the cotton cases, then,

[17] Indeed, petitioners concede that in one respect the statute was designed to go beyond contemporary notions of res judicata in precluding plaintiffs from proceeding in more than one forum. As the petition points out, "it was possible [at that time] for a claimant to sue a government officer in district court and, if dissatisfied with the proceedings, to sue the United States on the same claim in the Court of Claims. Res judicata posed no bar to the latter suit because the government was not a party to the earlier suit. The precursor of Section 1500 was, therefore, designed to require a plaintiff to choose one forum for his single claim." (Pet. 11 n.7).

Congress viewed the concept of a "claim" as focusing on the underlying factual basis of a controversy.[18] And as part of its purpose to ensure that an action against the United States with respect to a particular controversy be confined to a single forum, the statute made no exception for actions in which every conceivable theory of the case could not be presented to the same court. Indeed, the cotton cases themselves fell into this category.

The applicable precedent has adhered to this construction of Section 1500 and its predecessors by comparing actions pending in two courts by their operative facts and requests for relief, not their underlying legal theories. The purpose of Section 1500 is "to require the plaintiff to make an election between a suit filed in the Claims Court and one brought in another court when the same basic 'claim' is prosecuted against the United States * * * in both courts simultaneously." *Hill* v. *United States,* 8 Cl. Ct. 382, 385 (1985); see *Matson Navigation Co.* v. *United States,* 284 U.S. 352, 355-356 (1932). In order to achieve that statutory goal, "the term 'claim' * * * encompass[es] actions which have the same operative facts and request the same substantive relief." *Hill,* 8 Cl. Ct. at 386 (footnote omitted). In other words, "a suit in tort and contract can be the same claim or cause of action, irrespective of the theory of relief urged, if it arises with respect to the same operative facts, even if the contract claim, because of its value, could not have been maintained in district court." *Dwyer* v. *United States,* 7 Cl. Ct. 565, 568 (1985).[19]

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[18] For a similar approach in another context, see Restatement (Second) of Judgments § 24(1) (1982).

[19] See also, *e.g., Chavez* v. *United States,* 14 Cl. Ct. 212, 214-216 (1988); *Benally* v. *United States,* 14 Cl. Ct. 8, 10-11 (1987); *A.C. Seeman, Inc.,* v. *United States,* 5 Cl. Ct. 386, 389-390 (1984).

The conflict petitioners allege (Pet. 11-12) between the decision below and *Matson Navigation Co. v. United States,* 284 U.S. 352

Moreover, the proposition that a plaintiff may be required to elect a theory of recovery, as well as a forum, has long been recognized by the courts responsible for administering Section 1500. See, *e.g.*, *Wessel, Duval & Co.* v. *United States*, 124 F. Supp. 636, 638 (Ct. Cl. 1954) (plaintiff may not maintain an action under the Suits in Admiralty and Public Vessels Acts in the district court and a Tucker Act action in the Court of Claims when both actions were based on the same claim; the plaintiff "has no vested right to proceed in two courts"). In sum, "the word 'claim,' as used in section [1500 and its predecessors], has no reference to the legal theory upon which a claimant seeks to enforce his demand." *British American Tobacco Co.* v. *United States*, 89 Ct. Cl. 438, 440 (1939) (per curiam), cert. denied, 310 U.S. 627 (1940).

Here, both the Claims Court and the court of appeals properly applied that settled legal standard in reviewing and comparing petitioners' *Robinson* and *Newport News* complaints pending in the district courts with the filed Claims Court actions. The Claims Court specifically found that those actions and the *Robinson* case were based on the same operative facts and sought monetary damages

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(1932), is illusory. In *Matson*, as the court of appeals recognized (Pet. App. 22a-23a), this Court stated that Section 154 of the Judicial Code of 1911 (the predecessor to Section 1500) could not bar pending suits on the same claim against the United States because the express language of Section 154 only referred to pending suits against agents of the United States (284 U.S. at 355-356). Congress, in 1948, therefore remedied that apparent anomaly by amending the provision to its present form to include pending suits against the United States as well as suits pending against agents of the United States. Act of June 25, 1948, ch. 646, § 1, 62 Stat. 942. Contrary to petitioners' suggestion, nothing in *Matson* calls the court of appeals' application of Section 1500 into question.

for the government's conduct (Pet. App. 58a-63a).[20] That court similarly found that petitioners' Claims Court actions and the *Newport News* cases "plead[ed] the same operative facts underlying both the Government's specifications and knowledge of shipyard conditions and the Government's alleged duties to exercise care, supervise, and warn concerning the use of asbestos-containing products in shipyards" (*id.* at 63a (footnote omitted)). The court of appeals fully agreed with the Claims Court's assessment, concluding that the "operative facts which support the several legal theories [petitioners] raised are * * * the same" (*id.* at 15a). Indeed, the court of appeals expressly found that the complaints in both the *Robinson* district court case and the *World War II* Claims Court test case raised ten substantially similar material allegations (*ibid.*), and that "all the complaints, i.e., the [*Robinson*] case, the third-party complaints [*Newport News* cases], and all the Claims Court cases seek" similar relief, namely, "recovery for costs and expenses incurred and other damages connected to suits brought by shipyard workers against [petitioners], alleging injury from exposure to asbestos" (*ibid.*).

At bottom, petitioners have pursued a litigation strategy of slicing off pieces of what the Claims Court and court of appeals correctly saw as one major controversy—the alleged liability of the United States for using petitioners' asbestos-containing products in public and private shipyards—and then filing separate actions in both the district

[20] The facts in these actions were, of course, not identical, since the specific individuals for whom recovery was sought were not the same. But total identity is not required under the statute's approach to the definition of a claim. This is implicit in the use by the courts below of the term "operative facts" but is perhaps more accurately expressed by the term "common nucleus of operative fact" used by this Court in another context in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966).

courts and the Claims Court. As the Claims Court succinctly stated, petitioners "cull[ed] the [*Robinson*] case out of the Claims Court litigation" (Pet. App. 62a). But that is precisely the litigation-splitting activity that Congress intended to prohibit in Section 1500—activity perhaps prompted by the hope that somewhere, in some court, an issue will be decided that can then be given collateral estoppel or even claim preclusive effect in other actions involving the same controversy. Here, the concurrent factual findings by the appellate court and the trial court fully support those courts' application of Section 1500. Accordingly, further review is inappropriate. Cf. *Goodman* v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 7-8.[21]

2. Petitioners also contend (Pet. 15-17) that the court of appeals' decision conflicts with *Casman* v. *United States*, 135 Ct. Cl. 647 (1956), *Prillman* v. *United States*, 220 Ct. Cl. 677 (1979), and *Allied Materials & Equipment Co.* v. *United States*, 210 Ct. Cl. 714 (1976). In both *Casman* and *Prillman*, the plaintiff's district court actions sought reinstatement, while their Court of Claims actions

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[21] Petitioners mistakenly rely (Pet. 13-14) on this Court's decisions in *Nevada* v. *United States*, 463 U.S. 110 (1983), *Montana* v. *United States*, 440 U.S. 147 (1979), and *United States* v. *Moser*, 266 U.S. 236 (1924). Those cases involved determinations that the doctrines of res judicata and/or collateral estoppel prevented the United States from relitigating cases that the government or its surrogates had already taken to final judgment. But, as noted above, Section 1500 is not a mere legislative version of the res judicata/collateral estoppel doctrine. Rather, Section 1500 prevents a plaintiff from bringing a Claims Court action if the plaintiff has a pending action in any other court involving the same nucleus of operative facts. Neither res judicata nor collateral estoppel doctrine would require dismissal in such circumstances.

sought backpay. In finding Section 1500 inapplicable, the Court of Claims held that "[t]he claim in this case [for backpay] and the [injunctive] relief sought in the district court are entirely different." *Casman,* 135 Ct. Cl. at 649-650; see *Prillman,* 220 Ct. Cl. at 679. Here, by contrast, each of petitioners' pending actions seeks the identical relief of money damages. See *Shermco Indus., Inc.* v. *United States,* 6 Ct. Cl. 588, 593 (1984).[22]

In *Allied Materials & Equipment Co.* v. *United States,* 210 Ct. Cl. 714 (1976), the plaintiff first filed suit in district court against government employees, alleging, among other counts, violations of the Sherman Act, 15 U.S.C. 1 *et seq.,* and the Federal Property and Administrative Service Act, 40 U.S.C. 488 *et seq.* The latter statute, which provided for district court jurisdiction, made the antitrust laws "applicable to property disposal actions, and set up certain liabilities and penalties for fraud in connection with Government property disposal" (210 Ct. Cl. at 715). The plaintiff later filed suit in the

[22] See also Pet. App. 21a ("In * * * *Prillman* section 1500 was not applicable because of the *Casman* exception which applies where a different type of relief is sought in the district court (equitable) from that sought in the Court of Claims (money). * * * In the present case, however, the relief sought from both courts is money, but under different theories. The operative facts of the claims are the same.")

Casman and *Prillman* each involved a federal employee who claimed that the government wrongfully discharged him (135 Ct. Cl. at 648; 220 Ct. Cl. at 678). At the time, the Court of Claims had no jurisdiction to award reinstatement, but had exclusive jurisdiction to award backpay (135 Ct. Cl. at 650; 220 Ct. Cl. at 679). The problem of bifurcated relief presented in *Casman* and *Prillman* no longer exists since 28 U.S.C. 1491(a)(2), as amended in 1982, now authorizes the Claims Court to "issue orders directing restoration to office or position." The question whether those decisions are correct interpretations of Section 1500, or whether they should still be followed in other contexts now that the specific problem no longer exists, is not presented in this case.

Court of Claims, alleging a breach of contract and demanding more than $10,000 in damages (*ibid.*). In response to the government's motion to dismiss for lack of jurisdiction under Section 1500, the Court of Claims, without looking to the operative facts of the two pending actions and in a brief and cryptic opinion, treated the case as falling within the ambit of *Casman* v. *United States,* 135 Ct. Cl. 647 (1956), ostensibly because "[i]n neither court could [plaintiff] combine all its claims" (210 Ct. Cl. at 716). And indeed the court below suggested that *Allied* may have been squarely governed by *Casman,* since the opinion in *Allied* "does not state the plaintiff is seeking monetary relief in the pending district court cases" (Pet. App. 23a). Such efforts by the court of appeals to harmonize existing intracircuit precedent do not call for this Court's review.

3. Petitioners further contend (Pet. 12-13) that the court of appeals' decision cannot be squared with *Pennsylvania R.R.* v. *United States,* 363 U.S. 202 (1960). There, the Pennsylvania Railroad filed an action in district court to review an order of the Interstate Commerce Commission, which, if upheld, disposed of the railroad's claim that the government had underpaid for certain rail services. The railroad then brought suit against the government in the Court of Claims to recover the alleged underpayment. *Id.* at 203. The Court of Claims denied the government's motion to dismiss under Section 1500 and that ruling was not challenged in this Court (*id.* at 204). Thus *Pennsylvania R.R.* is inapposite. Moreover, the Court of Claims' Section 1500 ruling in that case falls within the ambit of *Casman* mentioned above: the district court proceeding involved only the propriety of the ICC's order and sought declaratory relief; the Court of Claims' action, on the other hand, involved only the railroad's

claim of an alleged breach of contract and sought only monetary damages (see 363 U.S. at 204-206). Here, of course, petitioners' various district court and Claims Court actions, arising out of the same operative facts, seek the same relief—monetary damages from the United States.

4. Finally, petitioners assert that further review is needed in order to provide "clear and predictable guidance for filing claims against the United States under the system of concurrent and parallel rights created by Congress under the Tucker Act and the Federal Tort Claims Act * * * " (Pet. 15). But that is precisely what petitioners sought from the courts below. As the Claims Court fully recognized, petitioners' Claims Court actions, as well as the *Robinson* case, were "test cases" designed to set the stage for further litigation under both the Tucker Act and the FTCA (Pet. App. 62a). Accordingly, the Claims Court quite correctly concluded that "[i]f section 1500 has any utility, it should be to force election between this court and others for massive litigation like the instant asbestos cases that can only be handled on a test-case basis" (*id.* at 62a-63a).[23] The courts below have now given petitioners the "clear and predictable guidance" that they sought and apparently needed. That straightforward application of Section 1500, which is wholly consistent with the long-recognized purpose of that provision, renders further review unwarranted.[24]

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[23] Indeed, petitioners' persistence in refusing to make such an election is apparent. Petitioners even balked at the Claims Court's invitation to proceed with their actions by seeking dismissal of the pending district court actions (Pet. App. 64a).

[24] Petitioners make a final passing reference (Pet. 17-18) to *Tecon Engineers, Inc.* v. *United States*, 343 F.2d 943, 946 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966), which held that a similar district court action filed *after* a Court of Claims action does not trigger the

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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jurisdictional bar of Section 1500. This case is not the proper vehicle for addressing that application of Section 1500 since the court of appeals expressly declined to consider the issue (Pet. App. 4a n.3).

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